Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-330

in the

Supreme Court
of the
United States

OCTOBER TERM, 1980

IN RE:
UNITED BEEF PACKERS, INC.,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Attorneys for Petitioner

QUESTIONS PRESENTED

1. In the interest of judicial economy should the denial by a United States District Court of a motion to quash a grand jury subpoena duces tecum be a final, appealable order within the meaning of 28 U.S.C. §1291?

2. Does the conflict that exists between the Second, Seventh and Eighth Circuits, where the denial of a motion to quash a grand jury subpoena by the United States District Court is appealable to the United States Court of Appeals, and the decision of the Fifth Circuit Court of Appeals in the instant case where said appeal was dismissed, deny to the Petitioner the equal protection of the laws as guaranteed by the U.S. Constitution?

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IN RE:
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

United Beef Packers, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the Fifth Circuit Court of Appeals entered in this cause on March 26, 1980.

ORDER BELOW

The order of the Fifth Circuit Court of Appeals dismissing Petitioner's appeal of the order of the United States District Court for the Southern District of Florida denying UNITED's Motion to Quash a grand jury subpoena is unreported.

JURISDICTION

The order of the Fifth Circuit Court of Appeals dismissing Petitioner's appeal was entered on March 26, 1980. The order denying United Beef Packers' petition for rehearing in banc was entered on July 9, 1980. The jurisdiction of this Court is invoked under §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws.

PREFACE

UNITED BEEF PACKERS, INC., will also be referred to as Petitioner and UNITED.

STATEMENT

a) Background

UNITED BEEF PACKERS, INC. ("UNITED") is a Florida corporation engaged in the wholesale marketing of meat and meat products. In 1978 UNITED sold an order of ham, with the skin, fat and bone still attached, to the Maritime Supply Co., Inc. (Maritime). The order was F.O.B. UNITED's plant. UNITED did not arrange for the order to be shipped to Maritime's premises and no documents were prepared relative to that. Maritime, through its division, Miami Grocery, subsequently arranged for the ham to be shipped from UNITED's plant to Menisfrica, Venezuela. The

shipment, which commenced on October 18, 1978, was pursuant to a contract Maritime had entered into with the exporting company known as the 3X Corporation. Apparently, 3X Corporation has a contract to provide the Venezuelan government with boneless ham, however, the ham sold to the government did not have the bone, skin and fat removed. The meat export certificate, numbered MP0326758 (Transcript proceedings before Judge Aronovitz on August 29, 1979 at page 12), which arrived in Venezuela with the product describes the ham as "boneless" and was apparently used to get the meat admitted into Venezuela.

In August of 1979 a federal Grand Jury commenced an investigation into the circumstances surrounding the inaccurate certificate. On August 26, 1979, the federal Grand Jury issued a subpoena duces tecum commanding UNITED BEEF PACKERS, INC. ("UNITED") to appear before it on August 29, 1979. Attached to the subpoena was a list of subpoenaed records covering the period from January 1, 1977 through June 1, 1979. In addition to the request for virtually every business record in UNITED's office, the subpoena also required UNITED to produce:

> Each and every typewriter in your custody, possession, control, or in the custody, possession or control of any of your agents or employees, and any attachments to the aforementioned typewriters.

The subpoena was signed by Assistant United States Attorney Paul G. Hyman.

On August 23, 1979, UNITED filed a motion to quash the Grand Jury subpoena and attached a memorandum of law in support thereof. The motion alleged that the subpoena was overly broad and sweeping and that compliance therewith would be tantamount to an illegal search and seizure in violation of the Fourth and Fifth Amendments to the United States Constitution.

On August 29, 1979, a hearing was held on UNITED's motion to quash before the Honorable Sidney M. Aronovitz. Subsequently, the Court found that the subpoena documents were relevant; that the subpoena was specifically drawn; that the time period for which it applied was reasonable; and that the subpoena was not overly broad. An order was entered on September 26, 1979 denying UNITED's motion to quash as to the documents and requiring that they be produced before the Grand Jury on October 3, 1979. As to the typewriters, the Court ordered that UNITED's motion to quash was granted until such time as the Grand Jury filed a written request for production.

On October 1, 1979, UNITED filed a notice of appeal of the court's order requiring production of the subpoenaed documents. Simultaneously it filed a motion for a stay of said order.

On September 28, 1979, after receiving the Grand Jury's written request, the district court ordered UNITED to produce the subpoenaed typewriters.

UNITED then amended its motion for stay to include the most recent order and filed an amended notice of appeal reflecting the change. The Fifth Circuit Court of Appeals dismissed UNITED's appeal on March 26, 1980 and UNITED's petition for rehearing in banc was denied on July 9, 1980.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve the conflict between the rule in the Fifth Circuit that denial of a motion to quash a grand jury subpoena by a United States District Court is not an appealable order and the rule in the Second, Seventh and Eighth Circuits that indicate that such a denial is an appealable order.

1. The bulwark of protection of the people against the oppression and intrusion of a seemingly omnipotent government into their private affairs and lives is the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

A subpoena or order for the production of books, papers and objects can constitute an unreasonable search and seizure within the ambit of the Fourth Amendment of the Constitution. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906). Corporations

as well as individuals are protected against such unreasonable demands by the Amendment. *Boyd v. U.S.*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Silverthorne Lumber Co., Inc. v. U.S.*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Peel v. U.S.*, 316 F.2d 907, 910 (5th Cir. 1963).

The compelled production of books, papers and objects through a subpoena duces tecum including that issued for investigation by the Grand Jury is within the guarantee of the Fourth Amendment against unreasonable searches and seizures. *Boyd v. U.S., supra.* Thus, a subpoena which is unreasonable and oppressive violates the Fourth Amendment to the United States Constitution and is the proper subject of a Rule 17 motion to quash. *Boyd v. U.S., supra; Hale v. Henkel, supra; Wheeler v. U.S.*, 226 U.S. 478, 33 S.Ct. 158, 57 L.Ed. 309 (1912); *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1913); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1945).

The duty of the District Court to protect against Fourth Amendment violations was clearly stated *In Re: Eastman Kodak Co.*, 7 F.R.D. 760, 762 (W.D.N.Y. 1947):

> Obviously the court has the duty to see that its judicial processes are not abused. It has the power to prevent clear injustice or an abuse of judicial process.

The subpoena duces tecum served upon UNITED BEEF PACKERS, INC. essentially requires them to

move their offices to the United States District Court. Virtually every business record for a period of two and one half years has been subpoenaed. The company is asked to even bring in its typewriters. As such this subpoena is grossly unreasonable and oppressive. The United States attorney has attempted through this subpoena to accomplish that which he clearly could not accomplish in a search of the business premises without a warrant issued on probable cause. The Grand Jury subpoena cannot be used as a subterfuge to accomplish an illegal search and seizure clearly prohibited by the Fourth Amendment.

A subpoena duces tecum must be reasonable and specific. *U.S. v. Maloney,* 37 F.R.D. 441 (W.D.Pa. 1965). A subpoena which seeks irrelevant material should be quashed. *Gilmore v. U.S.,* 256 F.2d 565 (5th Cir. 1958). There must be "a relation between the documents which must be produced and the purpose of the inquiry." *In re: Grand Jury Subpoena Duces Tecum addressed to Provision Salesmen and Distributors Union Local 627, AFL-CIO,* 203 F.Supp. 575, 578 (S.D.N.Y. 1961).

In this subpoena the government seeks to vacuum through all of UNITED BEEF PACKERS business records for two and one-half years and even requires it to bring its office equipment to the District Court. To the best of the knowledge of counsel and the company the Grand Jury inquiry only concerns one particular meat certificate issued by the United States Department of Agriculture. Yet apparently some typist followed a form for a Grand Jury subpoena that would include all business records which bear no relationship to the subject of inquiry. The form copied even includes "any

certificates concerning the trichinosis" when no one has suggested that the Grand Jury's inquiry has anything to do with trichinosis.

In addition to cabinets full of files, the subpoena even requests that company bring "each and every typewriter in your custody, possession, control or in the custody, possession or control of any of the agents or employees, and any attachments to the aforementioned typewriters". This language is so broad that it includes even a typewriter that a secretary of the company may have for her own use in her own home. To require the company to move its office equipment to the United States District Courtroom is ludicrous.

In *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 943 (1967) the Supreme Court through Mr. Justice White said

> The businessman . . . has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.
>
> . . .
>
> It is now settled that . . . the Fourth Amendment requires that a subpoena be sufficiently limited in scope, relevant in purpose, specific in directive so that compliance will not be unreasonably burdensome.

87 S.Ct. at 1739, 1740.

Compliance with the grand jury subpoena issued in this case would totally disrupt the business of the company and require it to essentially move its offices to the United States District Courthouse. Surely the United States attorney would not be able to examine every business record and the office equipment without a search warrant based upon probable cause at the company premises. Why under the guise of a Grand Jury subpoena can the United States attorney be allowed to require the movement of the company's offices into the courthouse?

Even under Chapter 12 of Title 21 of the United States Code dealing with meat inspections and companies in that business, the Department of Agriculture (upon whose behest apparently the United States attorney has sought the Grand Jury's subpoena) is only allowed reasonable access, upon notice, to the places of business of such companies for the "opportunity to examine the facilities, inventory and records thereof." 21 U.S.C. §642. The "records" are those required to be kept by firms in this business by the statute. Earlier in the week, and before the subpoena was issued, a representative of the United States Department of Agriculture, without notice or consent, started looking around the offices of UNITED BEEF PACKERS, INC. It was not long after he was asked to leave that this subpoena was served. This Court should not allow the Grand Jury system and the subpoena power of a Grand Jury to be abused by the United States Attorneys Office and the Department of Agriculture. Such a fishing expedition into the books and records of a company cannot be tolerated.

2. Oral argument on UNITED's motion to quash the grand jury subpoena was heard by the District Court. Despite presentation of the above arguments and despite the obvious fishing expedition launched by the United States Attorney's office, UNITED's motion to quash was denied. Appellate review of the District Court's decision was rejected by the Fifth Circuit and UNITED was thus placed in the untenable position of having to be held in contempt of the District Court's order before the Fifth Circuit would review the matter.

The case law in the Fifth Circuit holds that a district court denial of a motion to quash a Grand Jury subpoena is not an appealable order. *In re: Oswalt,* 607 F.2d 645 (5th Cir. 1979); *United States v. Grand Jury,* 425 F.2d 327 (5th Cir. 1970). However, because of the policy reasons underlying these cases, and because of the Appellant's grave concern for protecting its Fourth Amendment rights, the Appellant respectfully submits that this Court reconsider those cases in circumstances such as this.

It has long been recognized that a district court denial of a motion to quash a Grand Jury subpoena is not appealable because of the overriding need to preserve the "orderly progress" of the Grand Jury's investigation. *Cobbledick v. United States,* 309 U.S. 323, 327, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940). In *Cobbledick* the court reviewed the historical evolvement of the finality requirement as a condition precedent for appellate review. In doing so it summarized the rationale of the rule by noting that:

> Congress in the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified case.

Cobbledick at 309 U.S. 325, 60 S.Ct. 541. It is this concern for judicial economy that has manifested itself ever since the *Cobbledick* decision. Such delays have been described not only as, "inimical to the effective and fair administration of the criminal law," *Di Bella v. United States,* 369 U.S. 121, 126, 82 S.Ct. 654, 658 (1962) but a threat to the Sixth Amendment guaranty of a speedy trial as well. *Id.* There is no doubt that the prospect of numerable appeals from every phase of prosecutorial process is both unworkable and unnecessary. In that regard the need for a distinction between "final" and "interlocutory" decisions is a real one. However, in this case, the criminal procedure system as presently constituted does provide for a circuitous method of appeal. Thus, the issue is not *whether* one gets to appeal the denial of a motion to quash a Grand Jury subpoena, but simply *when* one gets to exercise that right. As a result, the denial of a motion to quash a Grand Jury subpoena is the one phase in the

prosecutorial system in which the "orderly progress," *Cobbledick* at 327, of the Grand Jury system is actually hindered by slowing down the inevitable appeal process; a process that would follow immediately from the district court's denial rather than having to wait until the target of the investigation is convicted as is the case with genuine "interlocutory" orders in a criminal case.

In *Alexander v. United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1902) the Supreme Court articulated the only recourse for an individual whose motion to quash a Grand Jury subpoena is denied. The Court stated that one's only option was to:

> Let the court go farther, and punish the witness for contempt of its order, — then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case. * * *This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit.

Cobbledick at 309 U.S. 327, 60 S.Ct. 542, 84 L.Ed. 783, citing *Alexander* at 201 U.S. 121, 122, 26 S.Ct. 358, 50 L.Ed. 686. This procedure was most recently affirmed by the Fifth Circuit in *In Re: Oswalt, supra.* As a practical matter, therefore, refusal of the Appeals Court to review the District Court's denial of the motion to quash the grand jury subpoena will result in the following:

(1) The Appellant will be forced to refuse to comply with the command of the Grand Jury subpoena;

(2) The United States Attorney's Office will then commence a proceeding in Federal District Court to hold the Appellant in contempt;

(3) The District Court will hold the Appellant in contempt; and

(4) The Appellant will file an appeal with the Fifth Circuit.

Unfortunately, absolutely nothing is gained from such a procedure. The net result is that many months from now, maybe even a year from now, the same parties are back before the Court of Appeals arguing the same points of law that the Fifth Circuit could have resolved by hearing the appeal from the denial of the motion to quash the subpoena. In the meantime, the Grand Jury proceedings continue to remain in abeyance until the subsequent appeals are disposed of. In such a situation there can be no winners. The integrity of the entire judicial system is forced to suffer simply by virtue of the added delay involved. In that respect alone, the very reason for the "no appeal" rule is thereby thwarted. Rather than streamlining the prosecution of a case and thus avoiding piecemeal litigation, the effect is just the opposite: more motions, more challenges and more appeals. In addition, the litigants are caused to suffer as well. They are forced to bear not only the financial costs

of such protracted litigation, but also the uncertainty of not knowing the status of their rights for a much longer period of time.

The compelling need to reconsider the "no appeal" rule is unique to cases in which a motion to quash a Grand Jury subpoena has been denied. This is so because appellate review is presently available in this case, but only after great delay and great expense to the litigants involved. It thus behooves this Court to consider the direct appeal alternative as practical solution to unnecessary litigation. Should direct appeal be adopted, the "orderly progress," *Cobbledick* at 327, of the Grand Jury system will be enhanced rather than hindered. As the Supreme Court has stated:

> The procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions.

Di Bella at 369 U.S. 124, 82 S.Ct. 657. In that regard it is much more "practical" to grant a direct appeal right in cases in which the district court denies a motion to quash a Grand Jury subpoena; an appeal that is inevitable should contempt proceedings be commenced.

3. The Eighth Circuit Court of Appeals has specifically held that:

> Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final or appealable order.

Schwimmer v. United States, 232 F.2d 855 (C.A. 8th Cir. 1956).

The right of appeal from such orders was also recognized in the Second and Seventh Circuits. See *United States v. Guterma*, 272 F.2d 344 (C.A. 2d Cir. 1959); *In Re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956). Petitioner's appeal in the instant case was dismissed on the ground that the Order of the District Court denying its Motion to Quash the Grand Jury Subpoena is not an appealable order within the meaning of 28 U.S.C. §1291. This split of authority results in a denial of the Petitioner's equal protection rights pursuant to the Fourteenth Amendment to the United States Constitution. The abrogation of that right can only be remedied by the granting of this Petition for Writ of Certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Telephone: (305) 377-0241

By: _____
WM. BRUCE HARPER, JR.

By: _____
DAVID W. BIANCHI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8 day of August, 1980, to Mr. Paul Hyman, Assistant United States Attorney, Miami, Florida.

By:_____
DAVID W. BIANCHI

Supreme Court, U. S.
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Supreme Court

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United States

OCTOBER TERM, 1980

IN RE:
UNITED BEEF PACKERS, INC.
Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

WM. BRUCE HARPER, JR., ESQUIRE
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Attorneys for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. G. J. No. 79-5(MIA)

In re
UNITED BEEF PACKERS, INC.

ORDER

This matter having come before this court on the United Beef Packers Motion to Quash Grand Jury Subpoena and upon consideration of:

A. Representations by the Assistant United States Attorney that this Grand Jury Investigation involves investigation of more than one United States Department of Agriculture Certificate in possession of or previously in possession of United Beef Packers and upon consideration of:

B. Applicable case law: *Branzburg v. Hayes*, 408 U.S. 665 (1972), *United States v. Sahley*, 526 F.2d 913 (5th Cir. 1976), *Matter of Berry*, 521 F.2d 179 (10th Cir., 1975), *United States v. Gurule*, 437 F.2d 239, (10th Cir., 1970), *Donnelly v. United States*, 201 F.2d 826 (9th Cir., 1953). *In Re Rabbinical Seminary Etc.*, 450 F.Supp 1078 (E.D.N.Y., 1978), *In Re Grand Jury Subpoena Duces Tecum Etc.*, 405 F.Supp 1192 (N.D. Ga., 1975), *In Re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of the M.*

G. Allen & Associates, Inc., 391 F.Supp 991 (D. Rhode Island, 1975), *In Re Corrado Brothers, Inc.*, 367 F.Supp 1126 (D. Delaware, 1973), *In Re Grand Jury Proceedings*, 73 FRD 647 (M.D.F.L., 1977), Title 21, United States Code, Section 42, and upon consideration of;

C. Argument of counsel and this Court being fully advised.

THIS COURT FINDS THAT:

1. That the subpoenaed documents are relevant to the aforementioned investigation and,

2. That the subpoena is specific with a reasonable particularity in identifying the subpoenaed documents and

3. That the subpoena requests the production of documents covering and encompassing a reasonable period of time and

4. That the subpoena is not overbroad.

It is hereby,

ORDERED AND ADJUDGED that United Beef Packers Motion to Quash Grand Jury Subpoena is hereby denied as to the documents listed thereon and,

ORDERED AND ADJUDGED that United Beef Packers shall produce the subpoenaed documents

before the Grand Jury on the 3rd day of October, 1979 at 1:00 P.M.

ORDERED AND ADJUDGED that United Beef Packers Motion to Quash Grand Jury Subpoena is granted as to the typewriters described on such subpoena, until such a time wherein the Grand Jury files a written request for production of said typewriters and upon further Order of this Court.

DONE AND ORDERED in Miami, Florida this 26 day of September, 1979.

Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE

cc: AUSA Paul G. Hyman, Jr.
William Bruce Harper, Jr.,
(Defense Counsel)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GRAND JURY No. 79-5 (MIA)

IN RE:
UNITED BEEF PACKERS

ORDER

By Order dated September 26, 1979, this Court granted United Beef Packers' Motion to Quash that portion of a Grand Jury Subpoena *Duces Tecum* which would require the production of designated typewriters. However, the Court further stated that it would reconsider the matter if the Grand Jury supplemented the subpoena with a formal written request for production of the typewriters in question. The Grand Jury, having filed such a written request for production, it is

ORDERED AND ADJUDGED that at a mutually convenient time, United Beef Packers shall produce, at its place of business, each and every typewriter in its custody, possession or control in order that type exemplars be taken.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of September, 1979.

Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

Copies furnished to:
U.S. Attorney
United Beef Packers, c/o William Bruce Harper, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3395

IN RE: UNITED BEEF PACKERS, INC.
UNITED BEEF PACKERS, INC.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before GEE, RUBIN and POLITZ, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss the appeal is GRANTED. In re Oswalt, 607 F.2d 645 (5th Cir. 1979); United States v. Grand Jury, 425 F.2d 327 (5th Cir. 1970).

Filed: March 26, 1980.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

July 9, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-3395

In Re:
United Beef Packers, Inc.
United Beef Packers, Inc.,

-vs-

United States of America

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By H. E. ADAMS, JR.
Deputy Clerk

cc: Mr. William Bruce Harper, Jr.
Mr. Atlee W. Wampler, III
Mr. Paul Hymn, Jr.

No. 80-330

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MICHAEL R

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED BEEF PACKERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-330

UNITED BEEF PACKERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the denial of its motion to quash a grand jury subpoena duces tecum was a final order that is appealable under 28 U.S.C. 1291.

1. A federal grand jury in the United States District Court for the Southern District of Florida is currently investigating transactions engaged in by petitioner, a wholesaler of meat. The investigation was prompted by the discovery of an altered medical certificate accompanying a shipment of hams which petitioner sold to a middleman, who then sent the shipment to Venezuela. The altered document inaccurately certified that the hams were boneless. The investigation was subsequently expanded to encompass other transactions in which petitioner engaged between January 1, 1977, and June 1, 1979.

On August 16, 1979, the grand jury issued a subpoena duces tecum directing petitioner to produce certain of its business records and office typewriters. Petitioner moved to quash the subpoena, and the motion was denied with respect to the business records. The court found that the subpoenaed documents were relevant to the investigation and that the subpoena was reasonably particular and not overbroad. The court quashed the portion of the subpoena that required the production of petitioner's typewriters (Pet. App. 1-3). The court thereafter granted the grand jury's written request to take type exemplars from the machines at petitioner's place of business (Pet. App. 4-5). Petitioner sought to appeal these two orders of the district court, but the court of appeals dismissed the appeal as interlocutory (Pet. App. 6).

2. a. The court of appeals correctly held that the district court's orders were not appealable. A court of appeals may review only "final decisions of the district courts." 28 U.S.C. 1291. This jurisdictional requirement, which precludes piecemeal review, "ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation" (*United States* v. *Nixon*, 418 U.S. 683, 690 (1974)); it also permits a grand jury to complete its investigation without unnecessary delay. As a general rule, therefore, "an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena *duces tecum* * * * is not final and hence not appealable." *United States* v. *Nixon*, *supra*, 418 U.S. at 690-691. Accord *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Accordingly, this Court has " 'consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between

compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.' " *United States* v. *Nixon*, *supra*, 418 U.S. at 691,[1] quoting *United States* v. *Ryan*, *supra*, 402 U.S. at 533.

The Court has recognized only one general exception to the rule that a party must resist the order and be held in contempt before he may secure appellate review. When documents are subpoenaed from a third party who is unlikely to risk contempt, the owner of the documents may appeal immediately. *Perlman* v. *United States*, 247 U.S. 7 (1918). Clearly, that exception does not apply here. Petitioner is both the owner and the custodian of the documents at issue.

b. Petitioner's assertion (Pet. 15-16) of a conflict among the circuits is unpersuasive. Two of the three cases upon which petitioner relies involved the *Perlman* exception. See *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir. 1959); *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956). In the third case, *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1956), parties who had complied with a grand jury subpoena sought an order to restrain the grand jury from turning over the subpoenaed documents to IRS agents for use in civil tax litigation. The parties did not challenge the grand jury's right to the documents, and there was no court order to resist. The parties could preserve their rights, therefore, only by appealing from

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[1]In *United States* v. *Nixon*, *supra*, the Court found a limited exception to the finality rule. The Court reasoned that, "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government" (*id.* at 691-692).

the order of the district court refusing to limit the grand jury's use of the documents to its own criminal investigation. Whatever the merits of that decision, the factors on which it relies for its finding of appealability are absent here.

Petitioner contends that only further delay will result from requiring it to be held in contempt before invoking the appellate process. As we have noted, this argument has been repeatedly rejected. See *United States* v. *Nixon*, *supra*; *United States* v. *Ryan*, *supra*. Any additional delay will be minimal. Moreover, the prospect of contempt will generally accelerate the grand jury investigation and any resulting criminal proceedings by discouraging persons who might otherwise resist the lawful process of the grand jury on frivolous grounds for purposes of delay.

Until petitioner resists the production order and is held in contempt, there is no final order from which it may appeal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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